UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

FEDEX GROUND PACKAGE SYSTEM, INC.
d/b/a FEDEX HOME DELIVERY[1]

Employer

and Case 4–RC–20974

FXG-HD DRIVERS ASSOCIATION

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, FedEx Home Delivery, operates a nationwide package delivery service. The Petitioner, FXG-HD Drivers Association, has filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of Pick-Up and Delivery (P & D) Contractors (herein called the Contractors) who work out of the Employer's Barrington, New Jersey Terminal. The Employer contends that the Contractors are independent contractors and therefore are not employees within the meaning of the Act. The parties also disagree as to the status of four Contractors who operate multiple routes and employ other drivers to assist with these routes; the Employer would exclude them, while the Petitioner would include them in the unit. The Employer additionally contests the Petitioner's labor organization status.

A hearing officer of the Board held a hearing, and the parties filed briefs. I have considered the evidence and the arguments presented by the parties, and as discussed below I have concluded that the Contractors are statutory employees, with the possible exception of the four Contractors operating multiple routes who shall be permitted to vote subject to challenge. I have also concluded that the Petitioner is a labor organization within the meaning of the Act. Accordingly, I am directing an election in a bargaining unit of all Contractors employed at the Barrington facility.[2]

To provide a context for my discussion, I will first present a brief overview of the Employer's operations. Then, I will review the factors that must be evaluated in determining independent contractor status and present in detail the facts and reasoning that support my

[1] The Employer's name was amended at the hearing.

[2] The parties agreed to the exclusion of package handlers, office clerical employees, mechanics, dispatchers, sales employees, managerial employees, professional employees, guards and supervisors, as well as temporary drivers employed jointly by the Employer and Adecco Associates, drivers and helpers employed by Contractors, and Contractor Edward Chang, whose status is discussed below.

conclusion that the Contractors are statutory employees. Finally, I will present the facts and my analysis concerning the Petitioner's labor organization status.

I. OVERVIEW OF OPERATIONS

The Employer was established in about 1998, when FedEx Corporation acquired Roadway Package Systems, Inc. (Roadway). The Employer has two operating divisions: the Ground Division and the Home Delivery Division. The Ground Division delivers packages of up to 150 pounds, principally to business customers. The Home Delivery Division delivers packages of up to 75 pounds, mostly to residential customers. The Barrington Terminal is part of the Home Delivery Division, which operates 300 terminals throughout the United States and has 3300 employees. In addition to these employees, the Home Delivery Division has agreements with about 4000 Contractors who deliver packages on 4400 routes.

Between 3500 and 4500 packages arrive at the Barrington Terminal each morning. Most of these packages are delivered by Contractors who service routes corresponding to particular zip codes. The Employer also employs "temporary" employees who make deliveries on routes temporarily without Contractors and who assist with deliveries when the volume of packages is too great for the Contractors to handle. When temporary employees are not being utilized by the Employer, they can be hired by Contractors who want time off or need extra help with deliveries.

Senior Manager Mike Cline is the highest-ranking official at the Barrington Terminal. P & D Service Manager Janet Lipscomb and Service Managers John Belz, John Maraguri, and Charles Brown report to Cline along with a terminal secretary and a clerk. Lipscomb, Belz, and Maraguri supervise the Contractors and temporary employees who make deliveries, while Brown supervises package handlers who sort the packages by route. The Employer also employs salespersons at the Barrington Terminal.

Temporary employees are hired by the Employer and supervised by the Employer's managers when providing service for the Employer but are paid by a different company, Adecco Associates. When providing services for the Contractors, temporary employees are paid directly by the Contractors. Individuals often work as temporary employees before becoming Contractors so that they can acquire some familiarity with the Employer's operation; about 75 percent of the individuals currently serving as Contractors in Barrington started as temporary drivers.[3]

The Barrington Terminal services 31 routes in southern New Jersey. At the time of the hearing, 25 Contractors were handling deliveries on 30 of these routes. The 31st route was temporarily vacant and being serviced by temporary employees.

Twenty of the 25 Contractors have signed agreements to service a single route and normally make deliveries on the routes themselves. One Contractor, Edward Chang, holds a regular job elsewhere, employs a driver to service his route, and only occasionally assists with deliveries.[4] Three Contractors – Francis Lynch, Carlon Schaeffer, and Mike McKenzie – have

[3] As noted above, the parties agree that the temporary employees should be excluded from the bargaining unit.

[4] The parties agree that Chang should be excluded from the unit.

agreements to service two routes, and a fourth Contractor, Giacomo Andreoli, has an agreement to service three routes. Lynch, Schaeffer, McKenzie, and Andreoli each make deliveries on one of their routes and pay drivers to handle the other routes.[5]

Once packages are sorted, they are loaded onto vehicles and delivered by the Contractors and temporary employees. Deliveries are made Tuesday through Saturday. Drivers deliver between 70 and 200 packages per day and spend between six and 10 hours per day on the job. Drivers normally do not pick up packages from customers and are usually not obliged to return to the Barrington Terminal when they have completed their routes except on Saturdays when they are required to return if they have packages they were unable to deliver.

II. THE INDEPENDENT CONTRACTOR STATUS OF THE CONTRACTORS

A. Factors Relevant to Evaluating Independent Contractor Status

Section 2(3) of the Act expressly excludes "any individual having the status of an independent contractor" from the definition of "employee" and thus the protection of the Act. The party asserting that an individual is an independent contractor has the burden of establishing that status. *BKN, Inc*., 333 NLRB 143, 144 (2001). In assessing whether an individual is an employee or an independent contractor, the Board applies common law agency principles to the factual context. *Pennsylvania Academy of the Fine Arts*, 343 NLRB No. 93, (December 6, 2004); *NLRB v. United Insurance Company of America*, 390 U.S. 254, 258 (1968). The multifactor analysis set forth in Restatement (Second) of Agency, Section 220, includes the following factors to be examined: (1) the extent of control that the employing entity exercises over the details of the work; (2) whether the individual is engaged in a distinct occupation or work; (3) the kind of occupation, including whether, in the locality in question, the work is usually done under the employer's direction or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time the individual is employed; (7) the method of payment, whether by the time or by the job; (8) whether the work in question is part of the employer's regular business; (9) whether the parties believe they are creating an employment relationship; and (10) whether the principal is in the business. *BKN, Inc*., supra. The Board has indicated that the Restatement factors are not exclusive or exhaustive, that no single factor is controlling, and that in applying the common-law agency test, it will consider "all the incidents of the individual's relationship to the employing entity." *BKN, Inc*., supra; *Slay Transportation Company, Inc*., 331 NLRB 1292, 1293 (2000); *Roadway Package System*, 326 NLRB 842, 850 (1998).

In determining independent contractor status, the Board also considers an individual's entrepreneurial risk in performing a service. *BKN Inc.*, supra at 144-145; *DIC Animation City, Inc.* 295 NLRB 989, 991 (1989). Entrepreneurial risk is evidenced where earnings are dictated

[5] The parties agree that the drivers employed by Contractors Lynch, Schaeffer, McKenzie, and Andreoli should be excluded from the bargaining unit. As discussed below, the Petitioner seeks to include Lynch, Schaeffer, McKenzie and Andreoli in the unit, while the Employer contends that they should be excluded even if the other Contractors are found to be employees.

by self-determined policies, personal investment, and market conditions. *The News Journal Company*, 227 NLRB 568, 570 (1976).

B. Facts

1. Hiring and Training Contractors

The Employer follows the same procedure in hiring and training both Contractors and temporary employees. The Employer places advertisements in newspapers and on the Internet emphasizing that the Employer is interested in individuals who have "dreamed of running" their own businesses, possess "an entrepreneurial spirit" and are interested in functioning as an "independent contractor." The advertisements indicate that to be eligible potential Contractors must be 21 years old, have a good driving record, pass physical and drug tests mandated by the United States Department of Transportation (DOT), be able to work Tuesday through Saturday, and have the ability to purchase the vehicle to be used in making deliveries.

Individuals who respond to the advertisement attend an informational meeting at which Employer representatives again emphasize that the Employer is seeking an independent contractor relationship. To highlight this point, the Employer representatives review the compensation a Contractor might receive and the expenses he might incur from a typical route and indicate the likely profit which might result. Individuals who remain interested following the meeting are asked to sign documents giving the Employer the right to access their driving and criminal records. DOT regulations compel the Employer to obtain the driving records of potential employees but do not require the criminal background check.[6] Individuals with acceptable driving records and no evidence of a criminal history are then asked to take physical and drug tests.

Upon passing these tests, applicants are scheduled for training, but they may avoid training if they have one year of recent commercial driving experience and the Employer grants an exception. At present, the training includes eight days of classroom work, one day of driving with a current Contractor, and five days of driving with the Employer's managers. Applicants are paid by the Employer for the time spent in training.

DOT regulations require the Employer to employ qualified drivers, and driving techniques are covered in the Employer's training sessions to permit the Employer to comply with this requirement. Applicants are also trained in the procedures to be followed in making deliveries, including such matters as how to load packages onto a vehicle, the most efficient method for making deliveries, and where to leave packages at a residence if nobody is home. Trainees are given a manual which reviews appropriate procedures to be used in making deliveries. Employer witnesses maintained that the delivery procedures and techniques reviewed during training were merely suggestions which did not have to be followed, but neither the manual nor the Employer's training video on delivery procedures makes this point clear.

Applicants must pass the training course to be eligible to drive for the Employer. Not all successful trainees become Contractors; some trainees choose to become temporary employees

[6] The regulations only apply to carriers operating vehicles in excess of 10,000 pounds. Although some of the vehicles used by the Employer's Contractors and drivers do not exceed the 10,000 pound threshold, the Employer requires all of its Contractors and drivers to comply with the regulations.

working for the Employer and/or Contractors. Temporary employees and Contractors receive the same training. Barrington Senior Manager Cline testified that the hiring and training process is designed to eliminate individuals unable to comply with DOT regulations and that the Employer anticipates that individuals who become Contractors will drive routes and deliver packages.

2. The Contractor Operating Agreement

Once training has been completed, trainees have the potential to become Contractors with designated routes. The Employer will not consider awarding a contract to a trainee unless he is able to lease or purchase an appropriate vehicle. The Employer specifies the types of vehicles it deems appropriate and provides would-be Contractors with the names of dealers at which such vehicles can be leased or purchased and lenders willing to finance purchases. Contractors are not obliged to patronize the dealers and lenders identified by the Employer and may purchase or borrow from other sources if they choose. The vehicles which the Employer requires cost between $20,000 and $35,000. The Employer does not provide Contractors with financing or guarantee the loans obtained by Contractors.

Acquisition of an appropriate vehicle puts the potential Contractor in position to secure a route and sign an agreement with the Employer. The Employer does not charge Contractors for routes; Contractors acquire them for free. The number of packages delivered from the Barrington Terminal has been steadily expanding over the past three years, and new routes are occasionally established. Contractors often terminate their relationship with the Employer – 13 departed in the 18 months preceding the hearing – which also makes routes available.

All potential Contractors are offered the same agreement (the Agreement). They can review the Agreement and ask questions, but there is no evidence that they have the ability to negotiate terms with the Employer. Rather, the Agreement is presented on a take-it-or-leave-it basis. The Employer periodically has Contractors sign Addendums modifying the Agreement.

Contractors can initially decide to sign an Agreement for a one or two-year period, and the Agreement will automatically renew for additional one-year terms if not terminated by either party. An Agreement can be terminated during its term by mutual agreement. It can also be terminated by one party if the other party fails to perform contractual obligations, by the Employer if it ceases to do business or reduces operations in the area serviced by the Contractor, or by the Contractor if he gives 30 days prior written notice to the Employer. Contractors are obliged to place $500 in an interest-bearing escrow account controlled by the Employer to cover any debts owed by the Contractor to the Employer at the time an Agreement is terminated. The Employer may retain this money as liquidated damages if the Contractor terminates the relationship without providing the required 30 days notice.

The Employer normally warns a Contractor in advance if it is contemplating termination due to non-performance, but it is not obliged to do so. Senior Manager Cline indicated that one Contractor had been terminated for non-performance during the year preceding the hearing, and a second Contractor was terminated in November 2003. The Contractors in both cases appear to have been terminated without prior warning. The Agreement allows any Contractor who believes he has been terminated improperly to bring the matter to arbitration.

The Agreement indicates that the Contractor has agreed to make equipment and a "qualified operator" available to provide services for the Employer. It also notes that the Contractor is providing services "strictly as an independent contractor." The Employer does not deduct taxes from the amounts paid to Contractors, although it reserves the right to pay "licenses" and "fees" for the Contractor and deduct the amounts paid from their checks.

Contractors may incorporate, and three of the Contractors currently employed in Barrington operate through corporations. When a Contractor has incorporated, the Employer pays the corporation for services rendered.[7]

3. Contractor Duties and Obligations

According to the Agreement, the Contractor must provide daily delivery service within a Primary Service Area and "such other areas as [the Contractor] may from time-to-time be asked to service." Service must be available "at times which are compatible with [the customers'] schedules and requirements." Customers contact the Employer, not the Contractor, to arrange deliveries. Contractors do not solicit customers, set the prices to be charged for delivery, or determine when and where delivery will be made.

A Contractor's Primary Service Area typically consists of a single postal zip code, but some of the zip codes serviced from the Barrington Terminal are not included within Primary Service Areas. Terminal management decides on a daily basis which Contractors will make deliveries in these areas, based on the volume of packages to be delivered in each Contractor's Primary Area. To assist in making assignments, terminal management sets a minimum and maximum number of packages to be delivered by each Contractor.

Contractors can not refuse to make assigned deliveries outside their Primary Service Areas. Contractors are also required to provide "premium service," which permits a customer to designate the time or date of a delivery, to opt for evening delivery, or to require that the recipient sign for the package. A Contractor can refuse to deliver an assigned package only if it is either damaged or weighs more than 70 pounds.

The Agreement permits the Employer to reassign the delivery of packages within a Contractor's Primary Area "on any day where the volume of packages . . . exceeds the volume that Contractor can reasonably be expected to handle." However, Barrington Senior Manager Cline testified that in Barrington packages to be delivered within a Contractor's Primary Area are reassigned only with the Contractor's consent.

The Agreement also allows the Employer to reconfigure a Primary Service Area after giving the affected Contractor five days notice and an opportunity to demonstrate that he can adequately service the original area. The Contractor may be compensated at the rate of $1 per package if the reconfiguration reduces the average number of packages delivered in his Primary

[7] The Employer offered to prove that Contractors at terminals other than Barrington had incorporated and to produce other evidence of operations outside Barrington. The Hearing Officer rejected this testimony. Any probative value from such evidence is slight in view of the fact that Petitioner only sought to represent contractors working out of the Barrington terminal. I find the Hearing Officer correctly excluded evidence of operations outside Barrington. Similarly, in view of the fact that several multiple route Contractors testified at the hearing, the Hearing Officer did not commit error by refusing to hold the hearing open to pursue subpoena enforcement proceedings against Chang.

Area. However, Senior Manager Cline testified that, the provisions of the Agreement notwithstanding, Primary Service Areas in Barrington are not altered without Contractor consent.

The Employer will sometimes hire temporary employees to assist Contractors if it believes package volume is too great for them to handle. Contractors can also rent extra vehicles and hire temporary employees themselves provided the Employer consents. The Employer has at least one vehicle available at the Barrington Terminal for Contractors to rent and will make arrangements for rentals from outside vendors if terminal vehicles are unavailable, but Contractors are responsible for any rental fees.

A Contractor is responsible for hiring a substitute driver in the event he wants time off or is unable to work due to injury. Substitutes and helpers must be qualified to work for the Employer. The Employer will provide the names of qualified temporary employees, but the Contractor must contact the temporary employees directly and negotiate terms of employment. The Contractor pays any substitute or supplemental drivers he hires and is responsible to the Employer for their work performance.

As noted above, some Contractors have agreements to operate more than one delivery route, and these Contractors hire drivers on a regular basis to provide service. The Agreement does not require the Contractor to drive, and at least one Barrington Contractor, Chang, employs a driver on his route while he works full time elsewhere. As is the case with temporary substitute or supplemental drivers, drivers hired by Contractors on a long-term basis must be qualified to work for the Employer. The Contractor determines long-term drivers' compensation and makes arrangements to cover their fuel costs and other expenses.

The Agreement states that the Employer does not have the authority to direct the Contractor as to the manner or means of performing his job and that the Employer can not dictate hours of work, break times, delivery routes, or other details of the Contractors' performance. Despite these provisions, the Employer exercises control over some of its Contractors' activities and provides Contractors with assistance in the performance of their contractually-mandated functions. For instance, Contractors are offered a Business Support Package for $4.25 per day, through which the Employer provides them with company decals, business cards, uniforms, DOT-required drug tests and vehicle inspections, mapping software, a scanner, other communications equipment needed to perform deliveries, and regular vehicle washing. Although purchase of the package is optional, all Barrington Contractors currently participate.

Another form of assistance is provided by the Employer's package handlers, who sort packages for Contractors by route and then number the packages to correspond to a suggested order of delivery prepared by the Employer. Contractors are required to scan packages with the Employer's scanner before loading them onto their vehicles, which allows the Employer to maintain a computerized record of deliveries. Contractors can load packages onto their vehicles in any way they choose, but the Employer teaches them a preferred loading method during pre-employment training. Every day, the Employer provides each Contractor with a map showing all of the Contractor's stops and the most efficient route to take in making deliveries, although Contractors can use different routes if they wish.

Contractors are required to scan each package again before making delivery. If delivery can not be made, the Contractor must enter a code into the scanner showing the reason and mark a cross on the package. At the end of each day, the Contractor uploads the information on

deliveries from his scanner into the Employer's computer system using an Employer-provided modem. Uploading normally takes place at the Contractor's home.

The preferred method for making deliveries is reviewed during pre-employment training. Most packages are delivered to residences when nobody is home, and the Employer has Driver Release Guidelines establishing the proper method to use in delivering packages to empty homes. Employer supervisors conduct quarterly Driver Release Audits to evaluate whether Contractors are complying with these guidelines. The audits involve visiting Contractor stops to observe where the Contractor has placed the packages and what steps the Contractor has taken to prevent the packages from being damaged by inclement weather. A Contractor who complies with the guidelines when making a delivery will not be held responsible if the package is lost or damaged.

Customer complaints about deliveries are usually directed to the Employer. Written complaints must be investigated by terminal management, which is required to prepare a written report detailing its findings.

Contractors are not required to return to the Barrington Terminal at the end of their workday except on Saturdays and may leave vehicles parked overnight at their residences. Each morning, terminal management conducts an audit of undelivered packages. Packages are delivered Tuesday through Saturday, and Contractors are required to return to the Barrington Terminal after finishing their routes on Saturdays so that packages left undelivered at that time can be audited immediately and not left until the following Tuesday morning. Contractors can not make deliveries on Sundays or Mondays without notifying the Employer.

Contractors are free to decide when they wish to begin their workdays, take breaks, or stop work temporarily to run personal errands. However, their discretion is limited by the need to complete all assigned package deliveries on time.

The Employer has a Safe Driving Program which includes minimum qualifications for Contractors and other drivers and a list of 25 types of prohibited on-the-road behaviors, including driving while under the influence of alcohol or drugs, speeding, carrying unauthorized passengers, failing to inspect and repair the vehicle, and failing to report an accident, among other things. Contractors who fail to comply with the Safe Driving Program must obtain additional insurance coverage at their own expense. Employer supervisors conduct Safety Rides with Contractors involved in accidents to evaluate driving techniques.

Employer supervisors also conduct up to four Customer Service Rides per year with each Contractor. Customer Service Rides are required if a customer complains about a Contractor, but are also conducted without provocation. The supervisor spends an entire day riding with the Contractor and recording the amount of time spent at each stop so that the Employer can determine whether the Contractor has an appropriate workload. At the end of the day, the supervisor fills out an evaluation sheet rating Contractor performance in a number of areas including package delivery, safe driving, professional appearance, and customer courtesy. Supervisors speak with Contractors whose performance is viewed as deficient either during a Customer Service Ride or otherwise. They may memorialize the discussions in Business Discussion Notes, which the Employer may rely on in deciding whether to terminate a Contractor for non-performance. The record contains more than 100 of these Notes.

DOT regulations require the Employer to have identifying marks on its vehicles and to have its drivers carry identification. The Employer also relies on its brand name in marketing its services. In order to comply with applicable regulations and foster brand name recognition, the Employer requires its logo to appear on vehicles used by Contractors. The logo used by the Employer is larger than required by regulation. A Contractor may also place his own name on his vehicle if he wishes to do so.

The Agreement requires the Contractor to maintain his equipment in accordance with applicable federal, state, and local laws. DOT regulations mandate that vehicles used by the Employer must be maintained in accordance with manufacturer specifications. To ensure compliance with both the contract and the regulations, the Employer requires Contractors to submit reports on vehicle maintenance and conducts periodic vehicle inspections. The Employer's supervisors also verbally remind Contractors of their need to comply with vehicle maintenance requirements, such as checking or changing their tires.

Contractors must pay for vehicle maintenance and repairs as well as for fuel and other expenses associated with the operation of the vehicle. Since the Employer has an interest both in making certain Contractors can comply with applicable regulations and having vehicles appear attractive to improve its corporate image, it encourages Contractors to establish maintenance accounts which can be used to defray vehicle maintenance expenses. To this end, the Employer will add $100 to each maintenance account for each quarter in which the Contractor maintains a $500 balance.

Contractors are required to wear Employer-supplied uniforms and carry Employer identification badges when making deliveries. The Agreement specifies that the uniform must be maintained in good condition and that the Contractor must "keep his/her personal appearance consistent with reasonable standards of good order as maintained by competitors and promulgated from time-to-time" by the Employer. The Employer prohibits Contractors from wearing earrings while on the job.

4. Insurance

DOT regulations specify that carriers such as the Employer must be primarily responsible for injuries or damage caused by leased vehicles and must purchase insurance to cover the costs of such injuries or damage. However, the carrier may seek indemnification for any liability from the owner of the vehicle.

Consistent with the regulations, the Agreement requires the Employer to maintain insurance for property damage, personal injuries, cargo loss, or damage resulting from the Contractor's operation of equipment in connection with the Employer's business. The Employer also agrees to indemnify the Contractor against liability for damages resulting from the operation of the equipment with certain exceptions. Contractor indemnification does not apply in the event the Contractor or the operator of the vehicle engages in intentional misconduct or willfully negligent behavior. It also lapses if the Contractor fails to comply with the Employer's Safe Driving Program, in which case the Contractor is obliged to secure his or her own insurance for damages or injuries that occur while the Contractor is performing services for the Employer. Regardless of who is carrying the insurance, Contractors are liable for the first $500 in damages resulting from the operation of the Contractor's vehicle, although Contractor liability is reduced to $250 after one year and eliminated after two years of operation without an at-fault accident.

Contractors are responsible for up to $500 on each claim of loss or damage to packages given to the Contractor for delivery, but a Contractor can avoid such liability if the package was handled in accordance with the Employer's Driver Release Guidelines. Customer complaints about package damage are investigated by the Employer, which determines whether the Contractor should be charged.

The Agreement absolves the Employer of responsibility for claims resulting from the Contractor's relationship with the Contractor's employees, for liability stemming from a Contractor's failure to comply with laws or regulations applicable to the Contractor's business, and for cases where a Contractor fails to assist the Employer in the litigation of a claim. The Agreement requires the Contractor to have work accident or Workers Compensation insurance covering the Contractor and his employees. Contractors must also maintain insurance against liability resulting from the operation of the Contractor's vehicle outside the confines of the Employer's business. The Employer has a relationship with a company which will provide Contractors with any required insurance, and the Employer will deduct premiums from Contractor pay. Contractors need not use this company, however, and some of them have obtained insurance coverage on their own.

5. Contractor Compensation

The majority of Contractor compensation comes from payments for each delivery stop ($1.19) and each package delivered ($.22). The Employer additionally pays Contractors for "premium service" - $.50 for each stop at which the shipper has indicated a recipient signature is required, $2.75 per stop for evening deliveries, and $6.50 per stop for deliveries made at an appointed date or time. Contractors receive between $.07 and $1 for each delivery of an oversized package with the amount varying with the size of the package.

Contractors are paid a "vehicle availability" fee for each day on which they make a vehicle and qualified driver available to handle deliveries for the Employer. The fee ranges from $10 to $30 per day depending on the type and age of the vehicle made available. A $50 per day holiday bonus is paid to Contractors who make vehicles available on the workdays before and after six specified holidays.

Contractors receive a "fuel supplement" payment if the cost of fuel in the terminal area exceeds $1.25 per gallon, with the supplement ranging from $.01 per mile driven if fuel costs between $1.25 and $1.35 per gallon to $.08 per mile driven if fuel costs over $1.95 per gallon. The cost of fuel for purposes of this supplement is determined by Barrington Terminal management based on a sampling of prices at five randomly selected gas stations located in the vicinity of the terminal.

Contractors obliged to drive over 200 miles in a day to service a route receive an additional payment of $.15 per mile for each mile driven between 201 and 299 and $.30 per mile for each mile drive between 300 and 400. If a Contractor uses a second vehicle to help with his route, the miles driven by both vehicles are combined for purposes of determining the mileage payment. Most Barrington Terminal Contractors do not drive over 200 miles per day; a summary prepared for the Employer shows that on average only four of the 31 Barrington routes require Contractors to log over 200 miles in a day and none require more than an average of 226 miles per day.

Contractors are paid a per package fee for each package they load onto their vehicles at the start of the workday and an additional per package fee for any packages they are obliged to sort. Contractors are normally not required to pick up packages from customers, but shippers sometimes ask the Employer to retrieve items rejected by recipients, and they receive $.50 for each package in these circumstances.

Contractors receive daily "core zone payments" which vary depending on the density of packages available for delivery in the areas they service. The core zone payment is designed to compensate Contractors for agreeing to provide service during periods when package volume in an area is being developed, and the payments are periodically adjusted as package density in an area increases or decreases. A Contractor is only eligible for a core zone payment on days when he spends over seven hours making deliveries. The payment for an area is pro-rated if more than one Contractor makes deliveries there on a particular day. Core zone payments for Barrington Terminal Contractors at the time of the hearing ranged from $32 to $112 per day.

The Employer also pays Contractors a variety of bonuses. Contractors with one year of service receive a quarterly bonus of $150, which increases to $200 per quarter after three years of service. The Employer divides the year into a number of four or five-week long accounting periods, and a Contractor can receive a $70 bonus for each accounting period in which he has no at-fault accidents or verified customer complaints and meets Employer goals for the transfer of information to the computerized record-keeping system. An additional $50 bonus is paid in each accounting period to Contractors who do not fail a Driver Release Audit or receive a Driver Release complaint. Bonuses of between $10 and $30 are paid to all Contractors working at the Barrington Terminal for each accounting period in which the Terminal meets the Employer's goals for percentage of packages delivered.

The Employer is busiest during the period from Thanksgiving through Christmas. In 2004, it established a Peak Performance Bonus Program which paid Contractors additional amounts for each stop made over certain levels during the period between November 20 and December 24. They received an additional $1 per stop payment for stops over one threshold and a $1.75 per stop payment if they used a supplemental vehicle and made stops over a second higher threshold.

Contractors are paid weekly and receive a weekly Settlement Sheet which describes the computation of their compensation. Settlement Sheets introduced into evidence at the hearing indicate that as much as 40 percent to 50 percent of weekly Contractor income may come from these guaranteed core zone and vehicle availability payments. Compensation is for the most part unilaterally set by the Employer, but Contractors can appeal changes in their core zone payments and have done so successfully.

The gross revenue received by Contractors in Barrington varies from route to route. Summaries prepared by the Employer show annual gross revenues in 2003 ranging from $40,000 to $70,000 and in 2004 ranging from $45,000 to $90,000. Net income also varies. Contractor tax returns introduced into evidence at the hearing show annual results ranging from a loss of $474 to a profit of $22,902.

The Employer does not provide Contractors with fringe benefits and does not withhold taxes from their pay.

6. Route Sales and Other Miscellaneous Matters

The Agreement gives the Contractor the ability to assign his contractual rights to a replacement Contractor, provided the replacement is acceptable to the Employer and is willing to enter into an agreement with the Employer on "substantially the same terms and conditions" as the original Contractor. To testify as to the marketability of the routes, the Employer provided an expert witness, Robert Crandall, who is a partner in a litigation consultant practice. Crandall has an M.B.A. degree and considerable experience in providing economic and/or statistical analyses related to employment litigation matters. He testified that in his view, the Contractors have the characteristics of small businessmen because they make capital investments, have the opportunity to expand, can profit from hiring employees, and can generate profits or losses based on managerial skill. He also testified that there is significant variation between the routes as to how much the Contractors can earn. After analyzing data reflecting the Contractors' receipts and costs, he testified that the ability of Contractors to transfer their rights should make Barrington routes marketable, and he estimated the value of routes in Barrington at between $65,000 and $77,000. However, Crandall conceded that route value might decline if the Employer added new routes or existing routes were routinely available.

The experience at the Barrington facility differs from Crandall's analysis. The Employer does not sell the routes but gives them to Contractors for free. Senior Manager Cline indicated that he had heard of only one Barrington route being sold by one Contractor to another, and he did not know the terms of the sale. Contractor Francis Lynch has advertised one of his routes for sale, but the record does not indicate that he has received any offers to buy it. There is no other evidence of sales of Barrington routes.

Contractors must work at least one year for the Employer before they will be permitted to acquire a second route. Contractors seeking multiple routes must submit a business plan for the Employer's approval. The plans introduced into evidence at the hearing show the Contractors' service records and identify the drivers and vehicles they intend to use in servicing their second routes.

Multiple route Contractors are responsible for hiring, firing, and setting the rates of pay and benefits of second route drivers. Second route drivers must be qualified to work for the Employer, and the Employer can veto a Contractor's choice of employee. If a second route driver is not qualified at the time of hire, the Contractor must pay for any physical and drug testing required for the driver to become eligible for employment. The Employer obtains motor vehicle records for second route drivers without charging the Contractor. The Contractor must procure a substitute driver in the event his regular second route driver wants a day off. A multiple route Contractor may transfer packages from one of his routes to another without notifying the Employer.

The Contractors currently operating multiple routes gave varying reasons for their decisions to expand from a single route. Francis Lynch indicated that he acquired a second route to help a friend who wanted to drive for the Employer but could not acquire a route due to bad credit. Carlon Schaeffer reported that he obtained a second route because his brother wanted to work for the Employer but was barred from securing a route by the Employer's anti-nepotism policy. Giacomo Andreoli testified that he acquired a second and third route to help a friend with bad credit and a brother blocked by the anti-nepotism policy. Mike McKenzie was the only

multiple route Contractor to testify that he had secured a second route in order to increase his profits.

DOT regulations in most instances prohibit the operator of a vehicle leased to a regulated carrier from simultaneously transporting the goods of another regulated carrier, a rule which effectively precludes Contractors from working for two package delivery services at the same time. Expanding on the regulations, the Agreement prohibits Contractors from using their vehicles for any other purpose while in the service of the Employer. Contractors are free to use their vehicles for other purposes when not making deliveries for the Employer, but only one of the Contractors who testified – Giacomo Andreoli – had done this. Andreoli delivered newspapers in his vehicle on Sundays. Other Contractors have used their vehicles to run personal errands when not working for the Employer. The Employer's logo must be removed or covered if a vehicle is used outside the Employer's operation, and the Employer provides covers to enable the Contractor to accomplish this task easily.

C. Analysis

On three occasions prior to the Employer's acquisition of Roadway in 1998, the Board considered whether contractor drivers employed by Roadway were independent contractors or employees within the meaning of the Act. In each case, the Board found that the drivers were employees. *Roadway Package Systems,* 326 NLRB 842 (1998) (*Roadway III*); *Roadway Package Systems,* 292 NLRB 376 (1989), enfd. 902 F.2d 34 (6th Cir. 1990) (*Roadway II*); *Roadway Package Systems,* 288 NLRB 196 (1988) (*Roadway I*). More recently, the Regional Director for Region 22 considered the status of contractor drivers employed by the Employer at a Ground Division terminal in Fairfield, New Jersey, and, relying primarily on the most recent of the three Roadway cases, found them to be employees. *FedEx Ground Package System, Inc.*, 22-RC-12508 (2004) (Region 22 Decision). The Board denied the Employer's Request for Review of this decision.

The critical passage from the *Roadway III* opinion relied on in the Region 22 Decision reads as follows:

> "…the drivers here do not operate independent businesses, but perform functions that are an essential part of one company's normal operations; they need not have any prior training or experience, but receive training from the company; they do business in the company's name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the company's business under its substantial control; they have no substantial proprietary interest beyond their investment in their trucks; and they have no significant entrepreneurial opportunity for gain or loss. All these factors weigh heavily in favor of employee status . . . 326 NLRB at 851.

All of the factors cited by the Board in this passage also apply to the Barrington Terminal Contractors.

Contractors perform functions that are an essential part of the Employer's operations

The Employer is in the business of package delivery, and the Contractors deliver the packages. See *Roadway III* at 851. Thus, the Contractors perform the very services for which the Employer's customers pay.[8]

The Contractors do not need significant prior training or experience

As the Employer's recruiting brochures and newspaper advertisements make clear, anyone can become a Contractor so long as he is over 21, has a good driving record and no criminal convictions, can work a Tuesday through Saturday schedule, and can pass a physical and drug test. The Employer conducts an extensive training course to teach Contractors how to perform package delivery work. It also pays the Contractors for time spent in the course, suggesting that the training is the initial phase of Contractor employment and not a prerequisite to being hired.

The Contractors do business in the Employer's name

Contractors operate vehicles which must meet Employer specifications, and these vehicles bear the Employer's logo. The Contractors are obliged to wear the Employer's uniforms and carry Employer identification badges. While the logos, uniforms, and badges are to some extent designed to comply with DOT regulations, they are also an important component of the Employer's effort to market its brand name, and the logos are larger than required by the DOT. As the Board noted in *Roadway III*, the "drivers' connection to and integration into [the Employer's] operation is highly visible and well publicized." 326 NLRB at 851.

The Contractors receive significant assistance and guidance from the Employer

The Employer assists the Contractors in carrying out their functions in a variety of ways. Initially, the Employer directs Contractors to vehicle dealers and loan companies through which they can acquire vehicles needed to perform functions for the Employer, although they are not required to use these companies. Employer training materials describe preferred methods for making deliveries and safe driving techniques in some detail. The Employer monitors Contractor compliance with its suggested mode of operation through Customer Service Rides, Driver Release Audits, and Contractor Business Discussions. The Employer sorts packages for the Contractors and provides maps on a daily basis which show the Contractors' stops with a suggested order and route for delivery.

While Contractors own their vehicles, the Employer assists them in maintaining these vehicles and assures that they are properly maintained. Contractors are reminded of vehicle maintenance requirements, and vehicle inspections are conducted to make certain the Contractors follow through on these reminders. The Employer provides Contractors who maintain sufficient vehicle maintenance accounts with $100 per quarter to help defray repair costs. The Employer has vehicles available if Contractors need a supplement or replacement and will make

[8] In contrast, in *Dial-a-Mattress Operating Corp.*, 326 NLRB 884 (1998), in which delivery drivers were found to be independent contractors, the customers paid primarily for the mattresses, not the delivery service.

arrangements with rental companies if Employer-owned vehicles are not available, although the Contractor pays for the rental vehicle.

The Employer also helps Contractors meet insurance requirements by arranging coverage and deducting premium payments from the Contractors' pay. The Employer's Business Support Package allows Contractors easily to secure uniforms and other equipment needed to perform deliveries, and Contractors can obtain the names of substitute drivers from the Employer in the event the Contractor needs or wants to take a day off. The Employer solicits customers and is almost entirely responsible for arranging the deliveries made by the Contractors.

The Employer exercises substantial control over the Contractors' performance of their functions

The Employer dictates the terms of the Agreement and defines the areas in which the Contractors will make deliveries. In fact, the Agreement gives the Employer the right to alter a Contractor's Primary Service Area unilaterally, and the Employer has exercised this right. Moreover, the Agreement allows the Employer to assign Contractors deliveries outside their Primary Areas, and Barrington Contractors are routinely given such assignments. The Employer can also require Contractors to make deliveries in the evening or at appointed times. Significantly, Contractors must make all assigned deliveries; they do not have the discretion to decline work.

The Agreement permits Contractors to set their own work schedules, and in theory Contractors control their starting times and have the ability to take breaks when they wish. In practice, however, the Employer's control over the number of packages assigned coupled with the requirement that packages be delivered on the day of assignment gives it substantial control over how many hours the Contractors will work and effectively limits the Contractors' ability to start work late in the day or take lengthy breaks. Contractors must provide delivery service on a daily basis from Tuesday through Saturday, and they can only deliver packages on Sundays or Mondays if they notify the Employer in advance. Packages assigned for delivery on a particular day must be delivered that same day, thereby effectively denying the Contractors the ability to defer work from one day to the next.

The Employer requires the Contractors to scan packages at the start of the workday and before delivery. Specified codes must be entered in certain instances, and the information entered into the scanner must be uploaded into the Employer's computer system at the end of each day.

The Employer has guidelines for safe driving, how to handle packages, and when packages can be delivered to empty residences. It regularly monitors compliance with these guidelines. The Employer can unilaterally decide to terminate its relationship with a Contractor if it believes the Contractor is failing to provide adequate service and may rely on the Contractor's failure to comply with its guidelines, thereby giving it the effective ability to enforce the guidelines. The Employer also gives bonuses tied to compliance with the guidelines, giving it a further measure of control over Contractor performance.

The Contractors do not normally engage in outside businesses

Contractors are banned from using their vehicles for other purposes while providing service for the Employer. They are theoretically able to engage in outside pursuits on their own time, but their ability to do so is constrained by the fact that they must spend five full days a week working for the Employer and are required to conceal the Employer's logo on their vehicles if they work elsewhere. The only record evidence of a Barrington Terminal Contractor engaging in an outside business is that a single individual uses his vehicle to deliver Sunday newspapers.

The Contractors have no substantial proprietary interest beyond their investment in their vehicles

Although the Employer's expert witness testified that routes should be worth substantial sums, actual experience at the Barrington Terminal suggests something different. The Employer gives the routes to Contractors for free, and the only evidence of a route sale was a single hearsay report from the Barrington Terminal manager with no indication of the sale price. As there is no direct evidence that any routes have been sold, despite considerable turnover, there is an insufficient basis to find that Barrington routes have significant value or that the Contractors have a substantial proprietary interest in their routes.[9]

Contractors have little entrepreneurial opportunity for gain or loss

The Employer unilaterally sets the rates at which Contractors will be compensated and effectively determines how much Contractors can earn by deciding the number of deliveries they will be assigned. The Employer makes core zone density and vehicle availability payments which insulate Contractors from fluctuations in income due to reductions in the number of deliveries. While piece rate payments for package deliveries provide most Contractor income, Contractors may derive as much as 40 percent to 50 percent of their income from guaranteed core zone and vehicle availability payments. See *Roadway III*. The Employer also minimizes the Contractors' risk by giving them gas subsidies if the price gets too high. Contractors may be able to save money by deciding where to buy gas, when and where to make vehicle repairs, or how to drive their routes, but these savings cannot substantially alter their earnings. They can also earn some performance based bonuses, although these bonuses are not a major component of their compensation.

The Employer contends that the presence of multiple route Contractors at the Barrington Terminal demonstrates entrepreneurial opportunity and compels an independent contractor finding. In this connection, the Employer correctly points out that there were no multiple route Contractors in the Region 22 case at the time the hearing there was conducted and asserts that this case is distinguishable on that basis. However, the Contractors in the Region 22 case were found to be employees although Contractors were permitted to service multiple routes at the Fairfield terminal and some Contractors had in the past serviced multiple routes. Moreover, while Barrington contractors have the opportunity to acquire multiple routes, only a few Contractors have taken this opportunity, and only one Contractor testified that he did so to

[9] Similarly, after extensive analysis, the Region 22 decision found very little evidence over a 10-year period that drivers realized significant profit from route sales. Rather, in the overwhelming majority of acquisitions the routes "had little or no clear economic value." Pp. 84-85.

increase his income; the others acquired extra routes to enable friends or relatives to circumvent the Employer's nepotism restrictions or to operate routes despite credit problems.

Further, one of the major reasons that the presence of multiple route Contractors has significance is that these Contractors necessarily hire employees. In fact, the Region 22 Contractors, like the Contractors in Barrington, often hired substitute or supplemental drivers, and at least two of the Region 22 Contractors did not drive at all and used hired drivers to service their routes. However, the ability to acquire multiple routes and to hire helpers was not found to require a finding of independent contractor status in the Region 22 case or in *Roadway III*.[10] I therefore find that these factors, while favoring an independent contractor finding, are not determinative. See also *R.W. Bozel Transfer Inc.*, 304 NLRB 200, 201 (1991); *Mission Food Corp.,* 280 NLRB 251 (1986).

Comparison with Ground Division contractors

There are a number of other differences between the employment conditions of the Barrington Contractors and the employment conditions of the Ground Division Contractors at issue in the Region 22 Decision, and the Employer contends that these differences compel a different result. Specifically, the Ground Division Contractors deliver mostly to businesses, work different days, drive larger trucks, and receive different amounts of compensation for each package and stop. None of these differences, however, are significant to a determination of employee status.

The Ground Division Contractors, unlike their Barrington counterparts, return to the terminal at the end of each workday, a fact which suggests greater Employer control over Ground Division Contractor work schedules than is present in Barrington. However, this factor is outweighed by the right of the Ground Division Contractors to refuse deliveries outside their Primary Service Areas, a right not accorded to the Home Delivery Contractors in Barrington who must accept all assigned deliveries.

Conclusion

In sum, I find that the Employer has not carried its burden of demonstrating that the Barrington Terminal Contractors are independent contractors and conclude that a representation election in a unit of such employees is appropriate.[11] Admittedly, some aspects of the

[10] See *Roadway III*, supra at 845.

[11] The Board's recent decision in *Argix Direct, Inc.,* 343 NLRB No. 108 (2004), heavily relied on by the Employer in its brief, is distinguishable. Unlike the Employer in this case, in *Argix,* the employer did not specify the types of vehicles its contractors were obliged to use, did not assign contractors to specific routes, and permitted contractors to refuse work assignments without penalty. In fact, Contractors could elect not to accept routes on specific days of the week and take significant time off, and the employer did not guarantee that employees would receive work each day. Thus, the employer had much less control over its contractors than the Employer in this case. Moreover, in *Argix,* it was far more common for contractors to operate multiple routes, as five of the contractors owned 20 of the 63 trucks.

The Employer also relies heavily on *Dial-A-Mattress*, supra, but that case is also distinguishable. Among other distinctions, the contractors provided for their own training, were not guaranteed minimum compensation, could decline orders without penalty, and were not required to perform services every scheduled workday. In distinguishing that case from *Roadway III*, the Board emphasized that in *Roadway*, the employer provided various support plans to reduce risk for the drivers, such as the core

Employer's relationship with the Barrington Contractors suggest that the Contractors should be viewed as independent contractors. The Contractors own their own vehicles, can hire assistants or substitutes, may agree to service multiple routes, and may operate as corporations. These same factors were present, however, in the *Roadway III* and Region 22 decisions but the contractors were found to be employees in those cases, based on the other factors that outweigh them. As those factors are also present here, I see no reason to reach a different conclusion in this case.

D. Multiple Route Contractors

The Employer contends that the four multiple route Contractors should be excluded from the unit even if the other Barrington Contractors are found to be employees. The Employer asserts that exclusion is appropriate because the multiple route Contractors employ other drivers and because they serve as supervisors within the meaning of Section 2(11) of the Act. While the fact that the multiple route Contractors hire employees to assist with deliveries would not necessarily preclude their inclusion in the bargaining unit,[12] there is a question whether the Employer exercises sufficient control over the multiple route Contractors' employees to be viewed as a joint employer, in which case the multiple route Contractors might be viewed as Employer supervisors who should be excluded from the unit. Since the record evidence does not fully resolve this issue, I shall permit the four multiple route Contractors to vote subject to challenge.

III. THE PETITIONER'S STATUS AS A LABOR ORGANIZATION

A. Factors Relevant to Determining Labor Organization Status

Section 2(5) of the Act defines a "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." See *Polaroid Corp.*, 329 NLRB 424 (1999); *Alto Plastics Mfg. Corp.*, 136 NLRB 850, 851-852 (1962). The Board liberally construes this definition. *St. Anthony's Hospital*, 292 NLRB 1304, 1305 (1989), enfd. 902 F.2d 1572 (8th Cir. 1990).

Under this definition of a labor organization, an incipient union that is not yet representing employees may be accorded Section 2(5) status if it admits employees to membership and was formed for the purpose of representing them. *Coinmach Laundry Corp.*, 337 NLRB 1286 (2002). Labor organization status is not based on instances of a group's dealing with an employer. Rather, regardless of the progress of the organization's development, it is the intent of the organization that is critical in ascertaining labor organization status. *Armco, Inc.*, 271 NLRB 350 (1984); *Edward A. Utlaut Memorial Hospital*, 249 NLRB 1153, 1160 (1980).

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zone settlement and the van availability payment, as well as its practice of transferring overflow work to other drivers. The Board also noted the Business Support Package and the requirement that drivers provide delivery service each day, along with the employer's controls over the appearance of the drivers and their vehicles. In all of these respects, the Employer has continued Roadway's practices.

[12] See *R.W. Bozel Transfer, Inc.*, supra at 201, fn. 16.

Moreover, "structural formalities are not prerequisites to labor organization status within the broad meaning given that phrase in Section 2(5)." *Coinmach Laundry Corp.*, supra; *Yale New Haven Hospital,* 309 NLRB 363 (1992); *Betances Health Unit, Inc.,* 283 NLRB 369, 375 (1987). Labor organization status has been found even when the organizations have lacked a combination of several of the following: constitution, bylaws, officers, minutes of meetings, reports filed with government agencies, dues or initiation fees, formal membership, and formal structure. *Yale New Haven Hospital,* supra. at 364; *Betances Health Unit,* supra; *Comet Rice Mills,* 195 NLRB 671, 674 (1972); *East Dayton Tool & Die Co.*, 194 NLRB 266 (1971); *Butler Mfg. Co.,* 167 NLRB 308 (1967). It is well settled that the existence of elected officers and a constitution or bylaws is not determinative in analyzing whether an organization or association is a labor organization with the meaning of the Act. *New Silver Palace Restaurant,* 334 NLRB 290, 295 (2001); *Armco, Inc.,* supra. Further, while such structural formalities may become relevant when and if an organization becomes the collective-bargaining agent of a unit of employees, they are not essential to its existence at the early stages of organization. *Comet Rice Mills,* supra.

B. <u>Facts and Analysis</u>

The Petitioner's Treasurer, Francis Lynch, testified that the Petitioner has only been in existence for a few months. The Petitioner does not currently represent any employees for collective bargaining purposes, and this case is the first in which it has petitioned to represent anyone. The Employer's Contractors are members of the Petitioner and voted in a December 2004 election at which officers were selected. The Petitioner does not have bylaws or any formal rules. According to Lynch, the Petitioner exists at least in part to bargain for better wages and benefits for any employees which it might eventually come to represent and intends to bargain with the Employer on behalf of the Barrington Terminal Contractors if certified.

Lynch's testimony would normally be sufficient to qualify the Petitioner as a labor organization. See *Butler Mfg. Co.,* supra. However, the Employer contends that labor organization status should be denied to the Petitioner on the grounds that the Petitioner's actual purpose is to file a legal action against the Employer. Section 2(5) of the Act defines a labor organization as an entity which exists "in whole or in part" for purposes of collective bargaining. Under this definition, the Petitioner could qualify as a labor organization even if filing a legal action was one of the reasons for its existence so long as it also intended to engage in collective bargaining. The Employer could prevail on its labor organization claim only if it established that bringing a legal action was the sole reason for the Petitioner's creation.

The Employer did not produce any affirmative evidence at the hearing suggesting that the Petitioner exists solely for the purpose of filing a legal action. Instead, it sought to examine Lynch and the other Petitioner officials about the details of the organization's meetings and structure, inquiries into arguably Section 7 protected activity. The Employer did not indicate at the hearing exactly what it expected to prove through these questions, nor did it explain what evidence it had to support its claims regarding the Petitioner's purpose. Confronted with what appeared to be a "fishing expedition" into potentially protected conduct, the Hearing Officer refused to allow the Employer to proceed.

In its brief, the Employer insists that the Hearing Officer was wrong to limit its attempts to probe the details of the Petitioner's activities. Given free rein, the Employer insists it could have shown that the law firm which represented the Petitioner at the hearing was the sole source

of the Petitioner's funds; that the law firm scheduled, announced and ran the Petitioner's meetings; and that the law firm created and conceived the Petitioner for its own financial gain. The Employer has not indicated what evidence it has to support these claims, and the Employer's failure to produce or identify specific evidence in support of its arguments suggests that such evidence is not in its possession.

Before permitting an employer in a representation case hearing to delve into the details of arguably protected employee conduct, it is appropriate to require specific affirmative evidence indicating the basis for the inquiry; generalized claims are not sufficient. The Employer did not identify at the hearing any specific evidence indicating the Petitioner will not engage in collective bargaining on behalf of its members, and it does not point to such evidence its brief. Absent such evidence, I find the Hearing Officer properly limited the Employer's attempts to probe the details of the Petitioner's affairs. As the evidence indicates that the Petitioner seeks to represent employees for the purposes of collective bargaining with the Employer, I find the Petitioner is a labor organization within the meaning of the Act.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner claims to represent certain of the employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time Pick-Up and Delivery (P & D) Contractors employed by the Employer at its Barrington, New Jersey facility, excluding all other employees, temporary drivers, drivers and helpers employed by P & D Contractors, package handlers, office clerical employees, mechanics, dispatchers, sales employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for the purposes of collective bargaining by **FXG-HD Drivers Association**. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Eligible Voters

Eligible to vote in the election are unit employees employed during the designated payroll period for eligibility, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their status as such during the eligibility period, and the replacements of those economic strikers. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman–Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven **(7)** days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the ***full*** names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106 on or before **June 8, 2005**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (215) 597-7658 or by e-mail to Region4@NLRB.gov.[13] Since the list will be made available to all parties

[13] See OM 05-30, dated January 12, 2005, for a detailed explanation of requirements which must be met when electronically submitting representation case documents to the Board, or to a Region's electronic mailbox. OM 05-30 is available on the Agency's website at www.nlrb.gov.

to the election, please furnish a total of two **(2)** copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of three **(3)** working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five **(5)** working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. A request for review may also be submitted by e-mail. For details on how to file a request for review by e-mail see http://gpea.NLRB.gov/. This request must be received by the Board in Washington by 5:00 p.m., EDT on **June 15, 2005.**

Signed: June 1, 2005

at Philadelphia, PA

/s/ [Dorothy L. Moore-Duncan]
DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four